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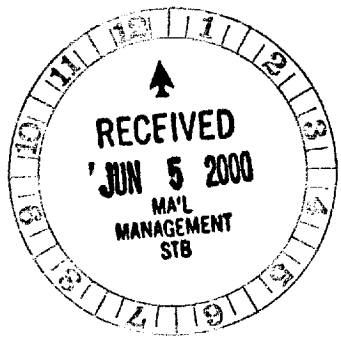

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary, Surface Transportation Board
Room 2215
1201 Constitution Ave., N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary
JUN 05 2000
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Public Record

Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed are the original and 25 copies of the "Reply Comments of Edison Electric Institute" for filing in the above-referenced proceeding, and a diskette containing the Comments in WordPerfect format.

Also enclosed are three additional copies for date stamping and return via our messenger.

Very truly yours,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

Enclosures

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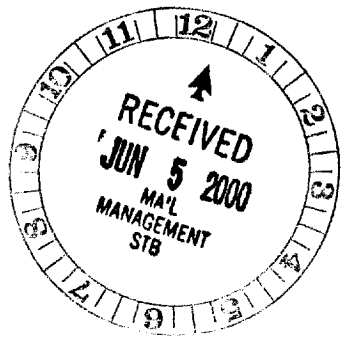
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD



Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF EDISON ELECTRIC INSTITUTE

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Due Date: June 5, 2000
Dated: June 5, 2000

REPLY COMMENTS OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI"), the association of the investor-owned electric utility industry, hereby submits its Reply Comments to the opening Comments filed by other parties in this proceeding. In the interests of brevity, EEI is not replying to the Comments of many parties, especially other shippers, whose views EEI generally endorses. For that reason, the lack of discussion herein of the Comments of various shipper, governmental, or other public interest parties should not be taken to imply any lack of agreement with the views expressed in those Comments.

SUMMARY

There is a consensus, among many if not nearly all of those filing opening Comments, that rail mergers have had deleterious effects on rail service and competition, and that the Board's policies must change to address those problems. The Board itself reached the same tentative conclusions in its ANPR, and the overwhelming consensus in support of the Board's tentative conclusions should cause the Board to propose changes to its rules to address those problems.

What is particularly notable is that it is not just shippers who submitted such Comments. The U.S. Departments of Transportation and Agriculture, State officials, and even railroad interests agree with many of the same points. Particularly notable are the Comments of Union Pacific Railroad Company ("UP"), Burlington Northern Santa Fe Railway Company ("BNSF"), and Canadian National Railway Company ("CN"), which support in some form not just open gateways but rate relief for shippers over "bottleneck segments" affected by mergers and relief for shippers from service failures. Also notable are the Comments of the Dakota, Minnesota & Eastern Railroad ("DM&E") and Montana Rail Link, Inc. ("MRL"), both of which endorse changes to enhance railroad competition.

Moreover, the Comments of Kansas City Southern Railway Company ("KCS") contain thoughtful suggestions for additional changes to the Board's merger policies that deserve careful consideration and support (except for KCS's self-serving suggestion that those changes and others the Board might impose should not apply to it). Norfolk Southern Railroad Company ("NS") and CSX Transportation, Inc. ("CSX") also offer some helpful procedural suggestions, but they are confined to enhancing the ability of parties in merger proceedings to put on their cases more effectively, so that the Board will consider matters that it now does not consider, or consider adequately. While EEI agrees generally with those suggestions of NS and CSX, those suggestions do not address the fundamental problems such mergers have created or could create in reducing or eliminating competition, raising rates, or causing worse service.

The Comments of the American Short Line and Regional Railroad Association ("ASLRRA") are also important. Short lines and regional railroads, such as DM&E and MRL, could play a vital role in providing better service in times of service failures and promoting competition in the regions they serve, if the proposals ASLRRA has made were adopted. For those reasons, EEI urges that they be given the Board's careful consideration.

In contrast are the self-serving substantive Comments of the "Defenders of the Status Quo," including the Association of American Railroads ("AAR"), CSX, Canadian Pacific Railroad ("CP"), and NS, imploring the Board not to make significant changes in the policies that have led to a loss of competition and a lack of an adequate remedy for service failures. (As already noted, some of the procedural suggestions of NS and CSX are useful, and should be carefully considered.) But the Defenders of the Status Quo have not proposed constructive solutions to the fundamental competitive problems that the Board, DOT, DOA, and shippers

have addressed. In fact, they deny those problems exist, or oppose remedies even where the problems are acknowledged.

CSX, for example, opposes the Board adopting as a condition on mergers a remedy for service problems, claiming existing remedies are adequate when virtually everyone else acknowledges they are not. Moreover, CSX argues that any action by the Board to modify the contractual "paper" and "steel" barriers inhibiting short lines and regional railroads from providing enhancements to competition would be contrary to public policy, but immediately follows that argument by defending the abrogation of collective bargaining agreements! It was also CSX which took the lead in the Conrail proceeding, Finance Docket No. 33388, in seeking Board action to abrogate the anti-assignment clauses in shipper contracts with Conrail. It therefore seems that contract abrogation is against public policy only when it does not serve CSX's interests to abrogate.

In these Reply Comments, EEI highlights those areas of broad agreement, especially where railroad interests have concurred, as the path toward a near-unanimous consensus on appropriate changes to the Board's merger policies. We also reply to Comments of those who have addressed matters not specifically addressed in the ANPR or whose views seem particularly worthy of a reply. EEI is separately joining in a joint Statement of many shipper parties setting forth broad areas of consensus about the matters at issue in this proceeding.

Argument

I.

RESPONSE TO MATTERS ADDRESSED IN THE ANPR.

There is broad (and, in some cases) surprising agreement on many matters addressed in the ANPR. EEI summarizes the most important areas of agreement below, in the order in which the Board addressed them in the ANPR.

A. Downstream Effects. While some parties argue for only limited consideration of downstream effects (e.g., CN), in its case for obvious reasons), virtually all parties commenting on this subject concede that the Board should consider at least some "downstream effects" of the merger transaction immediately before it. Indeed, BN notes in its Comments that the Board's sua sponte waiver of its "one case at a time" rule in response to the BN/CN merger announcement was not opposed by either BN or CN. We therefore take as conceded that the Board should abolish its "one case at a time" rule, or at least grant liberal waivers from it. EEI favors abolishing it, because the "end game" the railroad industry sees -- two transcontinental Class I railroads -- is considered inevitable by the industry and perhaps by the Board itself. If so, the Board cannot fail to consider that the "end game" is likely to result from the approval of any further Class I mergers. This distinguishes the railroad industry from other industries in which the "end game" is not obvious.

CN, however, argues that circumstances of future transactions are too speculative to consider. On this, CN may have a point, but as EEI understands it, that is not what the Board proposed to do. In any event, CN's point is not a substantial enough point to keep the rule. The Board does not have to determine whether UP will merge with NS or CSX to consider the effects

of a two-transcontinental railroad outcome in North America. So the Board shou the "downstream impacts" of the transaction immediately before it in ruling on th and the likelihood of a two-transcontinental railroad North America, when consid major merger to come before it, whether it be CN-BNSF or some other transaction, because that is the likely outcome to the proposal of CN and BNSF to merge.

B. Maintaining Safe Operations. EEI agrees that this is an important subject, but generally endorses the views of others, such as DOT and CN, on this matter. The Board already went a long way toward solving this problem by requiring Safety Integration Plans and by working closely with the Federal Railroad Administration ("FRA"). Those efforts should continue. Enforcement should be a high priority of FRA.

C. Service Standards. DOT, UP, and other railroads, as well as many shippers, also advocate well-defined service standards so that shippers might obtain meaningful relief in the event of service failures. While EEI certainly does not agree with limitations on such relief that UP, CN, and a few others propose, a breakthrough has been achieved just by the broad agreement on such principles. We urge the Board to adopt a service guarantee as a condition of mergers. EEI agrees with CN that a reason to approve an end-to-end merger is to "improve service" (CN Comments at 12); it follows that, if service does not improve, the merged railroad should be held responsible for failing to live up to the claimed benefits that would have been the prerequisite for its approval.[1]

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[1] While UP supports a service standard, it seems to propose one that falls far short of what is appropriate. UP seems to say that service would have be **50 percent worse** before a shipper would be entitled to relief. A shipper should not be **any** worse off because of a merger; by law,

(continued...)

CSX opposes service standards or the adoption of a remedy for service failures. This position seems tied to CSX's ongoing service failures, and for that reason alone should be ignored. The difficulty with the currently available remedies, apart from liquidated damage provisions of contracts (which would be unaffected by the Board's action in this proceeding), is that there is no "benchmark," and no obvious forum, to litigate these matters. If a non-contract shipper goes to court or to the Board to argue that a railroad has not provided "reasonable" or "adequate" service, the issue immediately arises: compared to what? Other industries are held to a "no failure" rule (absent force majeure situations); why not the railroad industry? But the Board is the only agency that can adopt well-defined standards **which are meaningful to shippers** and which would avoid endless arguments about a minimum level of service. EEI suggests the "first do no harm" rule; if service deteriorates from pre-merger levels for reasons other than force majeure, the presumption would be that the railroad would be obliged to pay. And the "benchmark" for determining whether service has deteriorated would be a useful and simple standard such as elapsed transit time, already a feature of many transportation contracts, not some meaningless (to shippers) standard such as train velocity or terminal dwell time. What matters to a shipper is how long it takes to get his shipment from origin to destination, and when. Everything else matters only to railroad management, or is at best an indirect measure of shipper satisfaction (or, these days, dissatisfaction).

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[1](...continued)
the shipper is entitled to reasonable service, and railroads merge voluntarily and at their own risk. If service deteriorates as a result of a merger, that is the responsibility of the merging railroads, not the shippers.

It is not at all clear that courts will consider non-contractual claims for service failures. The Board is often referred such cases, as it was the DeBruce Grain case. The Board should establish clearly that it considers itself an appropriate forum for such claims, or it does not. While the courts are also an appropriate forum, litigants may prefer to come directly to the Board, and should be encouraged to do so by rule or policy which indicates that the Board will quickly resolve such cases. EEI contends that it should be such a forum, but the issue needs to be resolved one way or the other, so that litigation costs are not incurred over whether the Board is an appropriate forum.

D. Promoting and Enhancing Competition.

1. Open Gateways. There is broad agreement that gateways should remain open despite future mergers, and we urge the Board to adopt a rule requiring that. If there is any justification for closing a gateway, a merger applicant should be required to seek a waiver of the rule against closing gateways, so that parties are not required to devote resources to this issue in future proceedings.

But it is not enough just to keep gateways open. Rather, as UP candidly observed, "Vague assurances that gateways will stay open are not sufficient because there are too many ways to close them commercially." UP Comments at 11. EEI agrees. Therefore, the Board should either require that existing rate divisions or agreements be maintained (notwithstanding the self-serving arguments from certain railroads about the "DT&I" conditions), or "bottleneck" relief should be provided to shippers adversely impacted by such mergers, or both.[2]

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[2] While EEI does not concede that the Board does not have the authority to require a railroad to offer a shipper a contract over the non-"bottleneck" segment, as DOT argues, it is not (continued...)

2. Switching in Terminal Areas. Terminal trackage and yards are "essential facilities" within the meaning of the antitrust laws. Indeed, the St. Louis terminal area provided the factual setting for the quintessential "essential facilities" case in antitrust law. In the electric industry it is now accepted practice that essential transmission facilities are made available to all competitors at a reasonable fee. In its Order No. 888, FERC has consistently required open access as a condition of approving electric utility mergers. Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 (1996), Order No. 888-A, on reh'g, III FERC Stats. & Regs. [Regs. Preambles] ¶ 31,048 (1997), Order No. 888-B, on reh'g, 82 FERC ¶ 61,046 (1998), pet. for review pending sub nom., Transmission Access Policy Study Group et al. v. FERC, No. 97-1715, et al. (D.C. Cir. Apr. 30, 1998). There is clearly ample basis for amending the Board's merger policies to provide broad switching relief in terminal areas as a condition of mergers.

There is also broad agreement that the Board should do so. The only comments opposed to such relief are the self-serving comments of a few railroads, each of whom benefitted from closed gateways or reciprocal switching cancellations in the past, and who now wishes to continue to benefit from the leverage those actions have created as a result of their prior mergers. Moreover, it is too costly for every shipper potentially adversely affected by a merger to intervene and put on its proof. The Board exists to protect such shippers in mergers, whether or not they intervene, because the statute requires the Board to approve the proposed transaction

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[2](...continued)
practical to require such contracts be offered, because the Board cannot supervise the negotiating process, as others have explained.

unless it would adversely affect competition and the public interest. Terminals are those "chokepoints" at which a shipper must have the ability, as a practical matter, to interchange its traffic to another carrier if the shipper is to be able to rely on the competition that the other carrier provides for at least part of the movement. So long as the switching charge is adequate to compensate the track owner for his costs -- and the issue in past mergers has been whether the switching charges are too high, not too low -- there is no persuasive argument against establishment of a reasonable switching charge applicable to all shippers whose traffic is interchanged in that terminal.

3. "Bottleneck" Rates. DOT, and even such parties as UP and CN, advocate a modification of the Board's "bottleneck" decisions, in the merger context. These proposals would require a merging railroad to offer a rate over the "bottleneck" segment if an end-to-end merger would create a "bottleneck" situation. As the Board knows, the "bottleneck" issues have been among the most contentious before the Board in recent years, and if this proceeding begins to narrow the differences of carriers and shippers on such matters, the Board is to be commended for being the catalyst. EEI agrees that a broadened right of shippers to "bottleneck" rate quotes that they could then challenge before the Board, if need be, is appropriate, and well within the Board's broad power to condition mergers. See, e.g., Western Resources, Inc. v. STB, 109 F.3d 782, 784 (D.C. Cir. 1997); Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir.), cert. denied, 451 U.S. 1017 (1980).

4. "One-Lump" Theory. EEI proposed that the Board make clear that the "one-lump theory" is just that -- a theory -- and that it should not be presumed applicable unless overcome by evidence, but rather presumed inapplicable unless shown by the applicants through evidence

to be applicable. After all, the railroads are in possession of the data, and experience shows that it is extraordinarily expensive and difficult to extract enough data, during an expedited proceeding such as a merger proceeding before the Board, for a shipper or other non-applicant to obtain the data necessary to show that the theory is inapplicable.[3]

D. Short Line and Regional Railroad Issues. There is also broad agreement that competition is the solution to many of the problems that shippers face. Short line and regional railroads persuasively argue that they can be part of the solution, and EEI agrees. One railroad in particular is a major part of the solution, insofar as EEI and its members are concerned: the DM&E. As the Board knows, EEI strongly supports the DM&E, and commends the Board for giving it approval to build a line into the Powder River Basin ("PRB") to carry additional low-sulfur coal east. Moreover, DM&E correctly observes that the solution to the many of the railroad industry's problem is "[e]nhanced competition." DM&E Comments at 1. See also, Comments of MRL and ASLRRA. DM&E's suggestions about alternative dispute resolution are also useful and should be followed.

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[3] In this respect, although NS in its Comments largely defended the status quo from substantive change, it did provide a number of procedural suggestions that were quite helpful, such as the opportunity to obtain 100% traffic tapes from the applicants after they file their notice of intent to file their application but before they actually file the application, so as to avoid delay in considering the application. This suggestion would serve the needs not only of railroads which oppose the mergers of other railroads (such as NS opposing the CN/BN merger) but also serve the needs of shippers who may wish to be heard on such matters as the "one-lump theory." The undersigned sought extensive discovery of CSX and NS in the Conrail transaction, Finance Docket No. 33388, to obtain sufficient evidence to permit Drs. Alfred E. Kahn and Frederick C. Dunbar to attempt to demonstrate that the "one-lump theory" was inapplicable to Conrail, CSX, and NS. The record of that proceeding contains many orders of the STB and ALJ Leventhal grappling with that issue. Much of that process was rushed because of the need to obtain the data in time to meet the procedural schedule. NS' suggestion would be helpful in such circumstances.

E. "Three-to-Two" Issues. There is broad agreement in the Comments, even from the railroads, that there may be circumstances in which the reduction in the number of competitors serving a shipper could significantly reduce competition.[4] While the railroads and DOT suggest that the **number** of such instances is unlikely to be great, that should not be the issue now. Rather, the issue should be, what should be the policy if such a circumstance occurs in a merger? As a practical matter, the Board has followed a policy of only providing relief in "2-to-1" situations.[5] Given the Board's precedents in this area, "3 to 2" shippers who may be entitled to relief would be unlikely to come forward unless the Board encourages them to do so. For that reason, the Board should make it clear that it will presume the loss of competitors from "3 to 2" will entitle a shipper to relief, absent clear and convincing evidence to the contrary. This would necessarily be done case-by-case, as some of the railroads suggest, but shippers need to know that the Board is adopting a different policy on this subject **before** they incur the expense of intervening to protect against loss of competition at a "3-to-2" point.

EEI does not raise this point simply because it is theoretically correct. Rather, there is at least one destination where, for example, UP, BN, and IC all serve one destination. If BN and IC (as part of CN) merge, and either the merged entity or UP again have service difficulties of the sort that occurred in 1997-98 or are now occurring in the East, the assumption that two serving carriers is enough is obviously wrong. Moreover, prevailing wisdom in other industries is that the minimum number of competitors necessary for competition to be maintained is more than

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[4] E.g., UP Comments at 16 ("UP disfavors and hard-and-fast assumption that anticompetitive effects arise only when the number of rail carrier alternatives drops from two to one.").

[5] See, e.g., CN Comments at 37-40 and cases cited therein.

three. Accordingly, the Board's assumption that two carriers is enough is, as a practical matter, not correct.

A good example of the proof of that is the PRB, often cited to prove that competition from two railroads is enough. The introduction of the third competitor, DM&E, is obviously what UP and BNSF oppose precisely because the third competitor will create additional competition beyond that generated by the two existing competitors.

The Board should acknowledge that there is broad agreement among shippers and railroads that competition from three railroads can be more effective than from two, and that it welcomes a showing by interested parties, especially shippers, that a reduction in the number of competitors from "3 to 2" is a loss of competition that the Board will ameliorate.

F. Cross-Border Issues. EEI does not believe that cross-border issues per se require special rules to address. We live in an increasingly global world. Some EEI members have purchased electric utilities abroad; foreign investors have purchased EEI member companies.

Moreover, U.S. railroads have purchased interests abroad, such as Wisconsin Central and KCS, while foreign owners have purchased U.S. railroads, such as CN's merger with IC and Canadian ownership of the Delaware & Hudson, Soo Line, and Grand Trunk Western. There have been no adverse issues whatsoever associated with such foreign ownership. And, indeed, to further demonstrate that such interests are intertwined, a clear majority of CN shareholders are of U.S. citizenship.

EEI therefore believes that there is no issue as such with foreign control, whether it be CN's control of BNSF, or perhaps in the not-too-distant future, UP's control of CP, as has been rumored. Rather, the issue, if there is ever one, would be whether, **on the facts, the evidence, or**

the law, foreign control caused discrimination against U.S. shippers or ports, or harm to the public interest. But the issue would not arise, in EEI's view, simply because of the nationality of the owner.[6] It would arise, rather, because of the **facts, the evidence, or the law**, and would require a showing in a particular case that one route, or port, or community, is being favored or disfavored over another, or that there is overall harm to the public interest. This could not be decided on the basis of a rule about cross-border effects.

It is possible that the effect of Canadian law or policy on a merged U.S./Canadian railroad could be harmful to U.S. shippers, ports, or communities, because of the difference between that law and the law of United States. EEI is mindful that grain shippers, forest product shippers, and ports, among others, may have legitimate concerns, which BNSF's Comments seem to acknowledge. See especially, the Comments of the U.S. Department of Agriculture. Again, though, this would be a product of **facts, evidence, or law**, not because of presumptions about a matter based solely on nationality. The Board should avoid even a suggestion that nationality is relevant to its merger policy, unless the laws or regulatory systems of another country, such as Canada, require that it consider particular issues that it might not for another country.

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[6] After all, Mr. Tellier, CEO and President of CN, has been perhaps the most forward-thinking of all the Class I CEOs in his interest to protect shippers in the current regulatory and commercial environment. He sponsored a "Customer Bill of Rights," which no other railroad has ever done. It would not only be wrong, but contrary to the evidence, to conclude that CN should not be allowed to take control of BNSF merely because Mr. Tellier or a majority of CN's Board of Directors are Canadian. This is not to say that a CN/BNSF merger does not create competition issues, but simply that the nationality of the management should not be an issue.

II.

RESPONSES TO ISSUES NOT RAISED IN THE ANPR.

A. Public Interest. There is also broad agreement, again from DOT as well as UP among others, that mergers should not be approved unless they are in the public interest, and that heightened attention must be paid to such problems as service, service guarantees, whether the failure to achieve past benefits suggests that predictions of future benefits may be incorrect, and the like. Again, EEI agrees. Indeed, the Board should consider adopting a standard that treats claimed benefits as a given, and instead seeks to fashion remedies to **avoid any adverse impacts on competition or the public interest**. Whatever justification the ICC or the Board found in the distant past to approve mergers even if they had an adverse impact on competition[7], there is no longer any such justification, because the Board is correct that end-to-end mergers are not likely to create significant additional efficiencies.

B. Broad Power to Condition Mergers. The Board's power to conditions railroad consolidations is extraordinarily broad, as the Board has stated and all parties concede. The Board may impose conditions that merger applicants object to, in which case they are free to decline to close their transaction as conditioned. AAR suggests that this proceeding is somehow being used to promote policy changes outside the merger context. But the Board has not proposed changes to rules outside the merger context, and therefore AAR's fears are directed toward the wrong proceeding or forum.

C. Capital Needs. EEI's members, just like AAR's, are in "an extraordinarily capital intensive business." AAR Comments at 3. But competition is being introduced into the electric

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[7] See, e.g., CN Comments at 6-7 & n.7.

utility industry, and the transition from regulation to competition can be managed in such a way as to preserve the opportunity of the companies in that industry to recover their invested capital. EEI supports the introduction of increased competition in the railroad industry in such a manner as to protect the railroads' legitimate needs to raise capital. That is why EEI has, since before the time of the Staggers Rail Act of 1980, **supported** such legislative measures as differential pricing, the Rail Cost Adjustment Factor, legalization of transportation contracts, liberalized abandonment rules, and regulatory freedom for non-captive traffic. Nothing the Board or EEI have proposed should jeopardize those measures, or the railroads' ability to raise necessary capital. EEI continues to hope, though, that AAR recognizes that shippers have made proposals that would improve the capital structure of the railroad industry, such as EEI's proposal to prevent the passthrough of acquisition premiums in railroad mergers to customers. If the Board were to adopt such a proposal, railroads would pay lower acquisition premiums in future mergers, if any at all.[8] The industry would be far better off than are, for example, CSX and NS, who are struggling to repay the debt they assumed to pay the very high price they paid for Conrail. Therefore, even if the Board is inclined to adhere to its precedents which have permitted passthroughs of acquisition premiums paid previously (e.g., Finance Docket No. 33388, Decision No. 89 at 62-67), precedents with which EEI respectfully disagrees, the Board should, in the interests of railroads, shippers, and the public, preclude such passthroughs prospectively.

[8]There is no acquisition premium in the proposed CN/BNSF transaction.

III.

RESPONSES TO COMMENTS OF SELECTED PARTIES.

1. AAR Comments. The Comments of the AAR, despite the progressive Comments of some of its individual members, such as those of UP (discussed above) and KCS (discussed below), are surprisingly unresponsive to the Board's ANPR. AAR (1) defends differential pricing, even though that is protected by statute and is not the subject of the proceeding, (2) defends the railroads' need to raise capital, which again is not the subject of the proceeding (except, ironically, for acquisition premiums associated with mergers, which do impair the railroads' ability to raise capital for needed infrastructure and other such capital expenditures, which is in turn is AAR's concern), and opposes (3) "new regulatory burdens imposed through the merger process." AAR Comments at 8. But EEI takes it that the progressive proposals of railroads such as UP and KCS, discussed herein, are not included within AAR's definition or "new regulatory burdens imposed through the merger process," since those railroads endorse AAR's Comments. Rather, AAR seems to fear that other proposals, such as matters solely for Congress, might be adopted by the Board in this proceeding. EEI has confidence in the Board that it will not overstep its statutory authority in that manner.

2. Canadian National Railway Company. CN's Comments are worthy of serious consideration by the Board, even though EEI disagrees with parts of them. EEI is not opposed to mergers per se, so it would not contend in advance of consideration of an application from CN and BNSF that the CN/BN application should be denied. The transaction they propose may, or may not, promote competition, as CN contends it will. But this proceeding is simply not the place to reach conclusions about that particular transaction; the Board already concluded in the

Ex Parte No. 582 proceeding that it would not pre-judge that application, and it was right to take that position.

CN contends that a number of matters are outside the scope of this proceeding. While EEI agrees that certain matters should not be considered in this proceeding if there is not a connection to railroad consolidations, matters are not as clear-cut as CN contends. For example, a rail merger proceeding may be the only proceeding in which the Board could address a problem limited to the "bottleneck" segment, unless the Board revises its "bottleneck" policy (which EEI would support). An electric utility plant may be unable under the Board's interpretation of its statutory authority to obtain prescribed rates over the "bottleneck" segment unless the shipper has a contract over the non-"bottleneck" segment, but under those circumstances the shipper may need to have the Board address the loss of competition that the rail merger would create due to that lack of a rate remedy. For example, the Neal Plant of MidAmerican Energy, the Stout Plant of Indianapolis Power & Light Company, and others were adversely affected by the UP/Chicago & NorthWestern Railroad ("C&NW") merger or the Conrail acquisition, respectively, for reasons the Board is familiar with, yet neither could bring a "bottleneck" rate complaint against the "bottleneck" carrier under existing law unless it had a contract with the non-"bottleneck" carrier. These types of shippers need to raise issues interrelated with their "bottleneck" problems in rail consolidation proceedings because of their inability to obtain relief elsewhere.

Moreover, CN seems to advocate significant limitations on the relief a shipper could obtain in the event of a service failure, even though CN forthrightly is willing to be liable for service failures. EEI urges the Board not to impose arbitrary limitations on such relief in

advance, but rather to let a shipper put on its proof, as EEI recommended in its opening Comments.

CN also contends that the Board should make no change in its "one-lump theory" policy, contending that no party has successfully put on proof to show that the theory is inapplicable in any merger proceeding over the last 20 years. But as the Board knows, the ability of the only party to make a serious evidentiary effort at such a showing, ACE, et al. in Finance Docket No. 33388 (by Drs. Kahn and Dunbar, CN Witness Velturo's former colleagues at NERA) was thwarted in part by discovery rulings that deprived them of much of the data they needed for the 20-year period they needed to consider. Moreover, although the Board contended in Decision No. 89 in that proceeding that there was no "before and after" in their study, since it started (with respect to the Monongahela Railway) in 1991, that was incorrect. Conrail did not take control of the Monongahela until 1991, and obviously did not have an effect on contracts it had entered into until at least the next year.

But regardless of the merits of that study, the issue is whether the Board is willing to take a closer look at evidence that may demonstrate the "one-lump theory" to be inapplicable. EEI commends the Board for expressing such willingness in the ANPR. The theory is only applicable if certain rigid conditions are met. See Verified Statement of Alfred E. Kahn and Frederick C. Dunbar, referenced above. The Verified Statement of Witness William B. Tye, submitted with IMPACT's Comments, together with the Kahn/Dunbar Study, are overwhelming evidence that the "one-lump theory" is not applicable to the railroad industry, at least as now configured. It therefore is necessary for the Board to be willing to require merger applicants to

make necessary data available to test whether the theory is applicable. It should do so as soon as a notice of intent to file a merger application is submitted to the Board.

3. Enron's Proposal for a Secondary Capacity Market. EEI has considered the interesting proposal of Enron to create a secondary market in tradable capacity rights of railroads. The concept of a secondary capacity market has been adopted in other areas, including the electric industry. In EEI's view, the marketing of electricity has grown with such a secondary market. EEI believes that Enron's proposal should, therefore, be the subject of comments from railroads and other interested parties in the Board's NPR At this point, Enron merely has proposed that merger applicants be required to propose such a market or explain why they are not doing so, which should not be objectionable. EEI would find useful the views of other parties, especially the railroads, on Enron's proposal.

4. Kansas City Southern Railway Company. EEI agrees with much of what is in the separate Comments of KCS, except for its observation that "major" rail consolidations should be defined not to include transactions involving KCS. KCS is a Class I railroad, and a consolidation involving it and another Class I railroad could have significant effects on existing competition. Rather than exclude KCS now, without knowing the nature of the transaction, the Board would better serve the public interest if it expressed its willingness to consider exempting KCS from some of its rail consolidation rules if they are not necessary to protect or promote competition in a future consolidation proceeding.

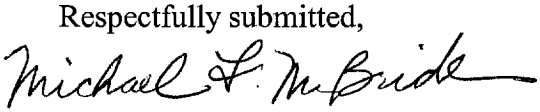
EEI is in general agreement with the other six proposals made by KCS in its Comments, namely, that (1) rail service options be preserved in merger proceedings, (2) service restrictions contained in marketing, haulage, and trackage rights agreements imposed as merger conditions

be disclosed and justified, (3) benefits claimed from prior mergers be preserved, (4) applicants should be required to disclose and discuss the impact of related negotiated agreements in merger proceedings, (5) recent cancellations of reciprocal switching access should be disclosed and discussed, and (6) merger applicants should be required to disclosed and discuss "paper" and "steel" barriers applicable to their shortline interchange connections in their applications. KCS's Comments are sufficiently well-developed and well-reasoned that EEI simply refers the Board to those Comments for justification for those proposals.

Conclusion

For the foregoing reasons, the Board should propose for adoption as issues to be considered in major rail merger, acquisition, and control proceedings the list of issues in EEI's Statement of February 29, 2000 in Ex Parte No. 582, and should propose for adoption the specific rule changes proposed by EEI in its Comments filed in this proceeding on May 16, 2000, as well as those further changes EEI supports in these Reply Comments.

Respectfully submitted,



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Due Date: June 5, 2000
Dated: June 5, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have served this 5th day of June 2000, a copy of the foregoing "Reply Comments of Edison Electric Institute" upon each party of record.

Michael F. McBride